

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 1331 of 2003****For Approval and Signature:****HONOURABLE MR.JUSTICE J.R.VORA****HONOURABLE MR.JUSTICE SHARAD D.DAVE**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
DOLUBHA ALIAS JADIYO ALIAS DOLATSING JAGATSINH ZALA & ORS

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Appearance :

MR KC SHAH APP for Appellant

None for Opponent No. 1

MR DIVESH B BHAVSAR for MR VC VAGHELA for Opponent No. 2

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA**and****HONOURABLE MR.JUSTICE SHARAD D.DAVE**

Date : 15/03/2007

ORAL JUDGMENT : (Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 This Criminal Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by Additional Sessions Judge, Fast Track Court, Palanpur, on 4th of July, 2003, in Sessions Case No. 28 of 2003, whereby both the respondents herein being accused of the said Sessions Case came to be acquitted of the charges levelled against them under Sections 397, 341, 34, 411 of the Indian Penal Code as well as under Section 135 of the Bombay Police Act.

2 Learned APP Mr. K.C. Shah for the State and learned Advocate Mr. Divesh B Bhavsar on behalf of learned Advocate Mr. V.C. Vaghela for respondent No.2 were heard.

3 Prosecution case reveals the fact that complainant of this case Bharatkumar Govindlal Patel, at the relevant juncture, was residing at Dantiwada and was serving as a Professor in Agricultural University. The incident in question occurred on 29th October, 2001. On that day, complainant Bharatkumar and his wife Manjulaben were going towards village Bariyaf, situated near Becharaji, for social visit, and they were travelling on scooter GJ-7 M 1022. After their work was over at Becharaji, they were returning to their residence on the scooter at about 4.00 p.m., they reached

near Kant road, plying between Deesa and Patan, from there they turned towards Dantiwada road having canals. They proceeded ahead on such road on scooter and they noticed that one scooter had overtaken their scooter and two persons of the said scooter parked their scooter in the darkness and started moving zigzag on the road so as to cause obstruction to the scooter of the complainant. Ultimately, on account of this obstruction, the complainant was compelled to stop his vehicle. At that time, it was about 7.30 p.m. The two persons who came on other scooter, rushed towards the complainant and his wife and they caught hold of the scooter of the complainant and extracted key of the scooter of the complainant. They opened dickey of the scooter and dhoti, clothes, cap etc which were kept in the dickey of the scooter, were taken out of these persons and threatening by them, complainant also gave his wrist watch and cash amount of Rs. 450/-. Complainant and his wife were threatened by knife and were put to fear that they were required to hand over everything they had to those persons. Under the fear, complainant and his wife handed over those things to these two persons. In addition to that, they had sweaters, shawl, etc which also had been taken by these two persons. Earrings worn by Manjulaben and one necklace, not of gold, were also snatched by those persons. Thereafter, those persons extracted air from the tyres of the scooter of the complainant and both of them came to their residence by walking. The complainant informed this incident to his close friends

Vinayakbhai and Bhargavabhai, who advised the complainant to file complaint before the police, but on account of threat administered by those persons, the complainant did not file complaint immediately, which came to be filed by the complainant on 25th of July, 2002, before the Police Inspector, LCB Police Station, Palanpur. The said complaint is on record at Exh. 17. In LCB Police Station, one photo albums of criminals was shown to the complainant and two persons were identified by the complainant from those photographs to be the persons involved in the incident of robbery committed on that day. On complaint being filed, investigation was undertaken by LCB Police and test identification was arranged before the Executive Magistrate, in which both the accused respondents herein were identified by the complainant and his wife and, hence, after drawing necessary panchnama and recording the statements of the witnesses, a charge sheet came to be filed against both the respondents in the Court of learned J.M.F.C. and the case was committed to the Court of Sessions at Palanpur.

4 Vide Exhibit-7, a charge came to be framed by learned Additional Sessions Judge, on 23rd of April, 2003 against both the respondents and both the respondents - accused vide Exhibits 8 and 9 pleaded not guilty.

5 The prosecution, therefore, examined as many as seven witnesses and produced on record necessary documentary evidence

like complaint, panchnamas, etc. after recording the evidence of the prosecution, statements of both the accused came to be recorded by the Trial Court under Section 313 of the Code of Criminal Procedure, wherein both these accused denied in toto the evidence of the prosecution and stated that a false case has been framed up against them. After hearing the prosecution as well as defence in detail, the learned Trial Judge came to the conclusion that the case was not proved beyond doubt against both the accused and, hence, the above said judgment and order of acquittal which is under challenge in this Appeal.

6 At this stage, we have heard learned APP Mr. K.C. Shah for the appellant – State and learned Advocate Mr. Bhavsar for respondent No.2 in great detail. We have called for the record and proceedings from the Trial Court, which we have scanned through both the learned Counsels appearing for the parties, assisted this Court with necessary copies of the documents to arrive at the decision.

7 Learned APP Mr. K.C. Shah vehemently opposing the judgment and order impugned in this Appeal, stated that both the accused were identified by PW-1 Bharatkumar and PW-2 Manjulaben and that the test identification is sufficient to connect the accused with the crime. It is submitted that the learned Trial Judge manifestly erred in coming to the conclusion that the

identification before the court is the weakest kind of evidence to rely upon. Learned APP therefore submitted that appeal has substance. While supporting the judgment and order impugned in this appeal, learned Advocate Mr. Bhavsar stated that there is no other evidence against the accused persons except the test identification. It is submitted that test identification parade was though properly held, but before the test identification parade, photographs of both the accused were shown to the complainant and his wife and subsequent test identification parade therefore becomes invalid. It is submitted that in these circumstances, the identification before the Court of the accused is the weakest kind of evidence and it is not safe to convict the accused only on the same evidence. In the above background, it is submitted that the Appeal is required to be rejected summarily.

8 Having heard learned counsels, needless it is to observe that the scope of Appeal against the acquittal is very well defined by the Apex Court. High Court in appeal against the acquittal possesses the same powers which it possesses in appeals against conviction. The High Court has also the power to reassess and re-appreciate the evidence and come to its own finding, but if those findings are the different from the findings of the trial court, then the High Court must deal with the grounds of the acquittal as advanced by the trial court and if those grounds and reasonings are found perverse and manifestly miscarriage of justice, interference in the appeal

against the acquittal is possible. Otherwise, ordinarily, unless the judgment and order of acquittal is so perverse and so manifestly against the law, interference in acquittal appeal would not be justified.

9 Though we have undertaken our own assessment of the evidence recorded and have re-appreciated the evidence very carefully, it is found that PW-1 Bharatkumar Govindbhai Patel is examined at Exhibit-16 and PW-2 Munjlaben Bharatbhai Patel is examined at Exhibit-18, both are the witnesses - victim of the incident. They narrated the incident as has been narrated by the complainant in the complaint. The complainant PW-1 at Exhibit-16 in his deposition admitted that in LCB Police Station at Palanpur, one photo albums of criminals was shown to the complainant and from that photo albums, they identified both the accused persons and thereafter test identification parade was ensued on 3rd of August, 2002 in the Office of the Executive Magistrate, wherein both of them had identified both the accused. PW-3 Prabhudhas Laxmanbhai Jadav is examined at Exhibit-21 and he stated that on 3.8.2002 vide yadi he was requested by Inspector, Palanpur Police Station, to arrange test identification parade in this case. He accordingly arranged the said test identification parade, which he has stated in detail in paras 1 and 2 of his deposition, and accordingly from the persons of 12 in number, the accused were identified by both the witnesses and accused were

standing at Sl. No. 9 and 10. A panchnama of the said parade was drawn, which is produced by him at Exhibit-23. PW-4 Dhanrajbhai Chamanaji Rathod examined at Exhibit 24, is panch of panchnama at Exhibit 23 and he stated that he was called as a panch on 3rd of August, 2002 in the Office of the Executive Magistrate at about 5.30 p.m. and both the witnesses identified both the accused. PW-5 Suraji Harchand Thakore is examined at Exhibit-25 and he was In-charge PSO of Taluka Police Station, Palanpur, and during that period, Police Inspector, LCB Police Station, forwarded complaint of the complainant for registering of the crime. He registered the complaint at Crime Register No. 141 of 2002 at Taluka Police Station, Palanpur. PW-6 Kalusinh Bhathisinh Khant, Exhibit-26, is P.I., before whom the complainant tendered his complaint on 25.7.2002 and he recorded the same and forwarded to the Police Station. He has deposed in this respect. He also admitted that he had shown one photo album of the criminals to the complainant and his wife, from which both of them identified the accused. PW-7, Exh. 28, Abbasbhai Thakarmiya, Investigating Officer is examined and he was working as ASI, LCB Police Station, Palanpur. He stated that he had drawn the panchnama of scene of offence, recorded the statements of the witnesses, arrested the accused and made arrangements for the test identification parade by Executive Magistrate and submitted charge sheet. This is all the evidence recorded from the prosecution side.

10 Going through the record and proceedings carefully of the case, we found that the learned Trial Judge gave following reasons for the acquittal of the accused of the charges levelled against them.

(i) No recovery of any of the articles stated to have robbed, was made from any of the accused during investigation.

(ii) In test identification parade, though both the accused were identified by the witnesses and prosecution proves identification parade, but it is an admitted fact that before the test identification parade, photographs of the accused were shown to the witnesses and, hence, there was no evidentiary value of such test identification parade. However, the only evidence against the accused was in respect of identification of accused before the court by both the witness PW-1 and PW-2 which itself is a weakest kind of evidence and therefore no conviction can be based upon that evidence at all.

11 The case, therefore, according to us, when we re-appreciated the evidence and reassessed the circumstances, rests on the only circumstance i.e. identification of the accused by PW-1 and PW-2 before the court.

12 The substantive evidence of the identification is the evidence of witness before the court that they have identified the accused who committed the crime. Therefore the identification is substantive evidence and becomes more reliable when it is being corroborated by test identification parade. Ordinarily, identification of an accused, for the first time, in the court by a witness is not reliable for the purpose of passing the order of conviction without definite corroboration. The evidence of identification before the court, which cannot be termed to be non-admissible evidence, but it is a matter of prudence and jurisprudential requirement that the same should be upon cogent corroboration, otherwise the justice delivery system stands affected.

13 While we re-appreciate and reconsider and scan all the circumstances of this case with the evidence recorded, we find that this incident occurred on 29.10.2001 and complaint of which came to be filed only on 25.7.2002, and on that day, from the photo albums, first time, both the accused after about nine months, came to be identified from the photographs. It should not be escaped from the mind that the incident has occurred in darkness at 7.30 p.m. According to the complainant himself, he was frightened as he was put to threat by knife. What impression of the features of the accused, PW-1 and PW-2 might have retained in their mind, therefore, it is an appropriate question to be considered. According to us, with human capacity, it might not have been possible to

gather the impression of the features of the accused at the time of incident and to be retained by the witnesses so as to identify them after nine to 10 months, and that too, through photographs. This exercise is necessary for the conclusion as to whether the identification before the Court is how corroborated to come to the aid of the prosecution to link the accused with the crime. No doubt that the test identification parade which was though arranged, according to law by the Executive Magistrate, is an evidence not helping the prosecution because it is an admitted fact that even before the test identification parade, the photographs of the accused were shown to the witnesses and when photographs were shown on 25.7.2002, test identification parade was held on 03.10.2002, wherein, undoubtedly, it was not a difficult task for both the prosecution witnesses to identify both the accused. Test identification parade therefore as rightly held by the Trial Judge might have been proved by the prosecution, but having regard to the manner in which the incident has occurred and the subsequent events took place as the showing of the photographs of the witnesses and identifying of the accused by the witnesses, such test identification parade, undoubtedly, weakens the evidence of court identification, because in those circumstances it would not at all be difficult to identify the accused by the witnesses as on 25.7.2002 and 3.8.2002 they had seen the accused, and therefore in this case, in the above mentioned circumstances, it appears that the only evidence goes against the accused being the evidence of

identification before the court, is definitely a weak type of evidence and in the said circumstances the learned Trial Judge has rightly not placed any reliance on this evidence. We do not find any exception to the findings of Trial Judge even at this stage. To be satisfied, we have carefully undertaken the exercise to go to the record thoroughly and we have appreciated each vital fact and circumstances of the case. We, therefore, found that the conclusion arrived at by the learned Trial Judge is not subjected to any interference and hence the following order.

“ The Appeal stands dismissed.”

(J. R. VORA, J.)

(SHARAT D. SHAH)